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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1959

NO. 398

UNITED STATES OF AMERICA, Appellant

vs.

STATE OF ALABAMA, et al., Appellees

BRIEF AND ARGUMENT OF APPELLEES

OPINIONS OF THE COURTS BELOW

The opinion of the United States District Court for the Middle District of Alabama was adverse to appellant, the United States; that opinion is reported at 171 Fed. Supp. 720 (R. 79-94). The appellant appealed therefrom to the Court of Appeals. The opinion of the Court of Appeals was also adverse to appellant. That opinion is reported at 267 F. 2d 808 (R. 101-108).

STATEMENT OF THE CASE

The case is succinctly stated by the pleadings and is sufficiently summarized in the opinions here being reviewed.

However, with the exception of the few additions here noted, appellees accept the general statement of the case as set out by appellant. Appellant's statement should be clarified to show or to include the following:

Neither the Trial Court nor the Circuit Court of Appeals found it necessary to consider the constitutionality of the Civil Rights Act (R. 92).

Defendants Rogers and Livingston resigned and gave written notices of their resignations to the appointing authorities *approximately two months before this case was filed.* The lower courts found as a question of mixed fact and local law that the resignations were absolute and unconditional and that they were made in good faith. It was shown that neither intends to serve again as a member of the Board of Registrars; that their resignations were accepted by the appointing board; and that both hold other public offices, each having qualified and begun serving in his new public office which of itself, ipso facto, and as a matter of Alabama law, vacates the first office. (R. 33 and 35; see also the Opinion of the Trial Court, particularly at R. 81-82 and 87 and the Opinion of the Court of Appeals, particularly at R. 102 and 107.)

At page 13 of appellant's brief, the statement is made: ". . . the complaint alleged that the individual defendant's purported resignations were made in bad faith for the purpose of avoiding their constitutional duty to register qualified Negroes" and that "The District Court, on the basis of affidavits submitted by defendants, found that their purported resignations were made in good faith." No such allegation of "bad faith" can be found in the complaint (R. 1-12); and, although appellant submitted affidavits and other evidence by way of deposition, not the slightest indication of "bad faith" was shown. On the contrary, on the matter of "bad faith" of the resignations, the controversy between the Civil Rights Commission and certain Alabama officials referred to in appellant's Statement of Facts at page 8 of appellant's brief occurred

long after Respondent Roger's intention to resign was made manifest, for Rogers ran for election and was elected State Representative in the May 1958 Primary election, while the controversy referred to occurred in December 1958 and January 1959 (R. 61 and 82).

At page 7 of the appellant's brief, it is stated that the amended complaint avers that the State of Alabama, through its agents, officials, and agencies, had engaged in discriminatory and unlawful practices. Attention is called to further allegations of the complaint which set out certain applicable laws of the State of Alabama specifically (R. 9). (These and other applicable State laws are, of course, within the judicial knowledge of the Court.) The Alabama law specifically forbids discrimination between applicants for voting. See Section 31 of Title 17, Code of Alabama 1940, referred to in the complaint at Appendix A to the complaint (R. 9-12). The complaint shows on its face by this specific allegation that if there be any discrimination against any applicant for registration, such discrimination is unauthorized under the laws of the State of Alabama and is completely ultra vires, being merely the individual action of some person or officer and not the act of the State; such action as complained of cannot be the action of an agent acting within the line and scope of his authority for and on behalf of the State of Alabama.

In appellant's brief, pages 14 to 18, there appears a further statement by way of "Introduction", which appears to be quoted from "The Report of the Commission on Civil Rights, 1959", and is completely outside the Record of this case.

QUESTIONS PRESENTED

The appellant (appellant's brief, page 2) presents two questions as being properly raised in this cause. Appellees respectfully insist that the questions are more properly expressed by the changes indicated and by the addition of the underscored phrases. We submit that, when the legal questions involved are thus properly posed, the answer to them becomes self-evident. (Changes from the Government's wording of the questions are indicated by placing the word to be deleted in parenthesis and italicizing the words to be added.)

1. Whether the Civil Rights Act of 1957 authorizes the United States to secure (equitable) "*preventive*" relief against a state in order to remove discriminations against Negro citizens unconstitutionally denied the right to vote *by the alleged illegal action of certain state voting registrars acting under the color of their office.*

2. Whether, in order to secure the federal voting rights guaranteed by the Constitution and the Civil Rights Act of 1957, voting registrars alleged to have violated such rights may be named as parties defendant where they have (purportedly) resigned from office and their successors have not been appointed *in an injunctive proceeding to prevent future discrimination.*

As to the first question: It is obvious that "preventive relief:" (to use the precise words of the Civil Rights Statute instead of the general words "equitable relief" employed by appellant) can be adequately secured against the wrongdoing individuals; indeed, the injunction can be directed with more certainty against the particular wrongdoers than generally against a governmental body as large as a state sovereignty.

As to the second question: What purpose is there for attempting to secure preventive relief to prevent future discrimination against an alleged wrongdoer who is no longer in a position to commit the wrongs complained of?

SUMMARY OF ARGUMENT

INTRODUCTION

The appellee raised as one of the various grounds of dismissal the contention that the Civil Rights Act was unconstitutional; however, the District Court disposed of the case without passing on the constitutional question. The Circuit Court of Appeals likewise found it unnecessary to consider the constitutionality of the statute.

The Argument of appellee is divided into three major sections:

I. Defendants Rogers and Livingston had effectively and completely resigned from the Board of Registrars of Macon County, Alabama, prior to the time suit was filed and had no connection with the Board of Registrars for any purpose at the time suit was filed.

II. An action under the Civil Rights Act must be against individual persons or officials, and the State of Alabama is not a proper party defendant in such an action.

III. Even if the Civil Rights Act authorizes an action against a state, the court should refrain from granting an injunction against the State of Alabama under the facts here existing.

The two carefully prepared opinions of the lower courts make the correctness of the judgement self-evident.

I

At the time this suit was instituted, Appellees Rogers and Livingston had no connection with the Board of Registrars of Macon County, Alabama. *Almost two months before*, on December 10, 1958, Rogers and Livingston resigned as members of the Board of Registrars and gave written notice of their unconditional resignation to the appointing authority. Under the established Alabama law, this is complete and effectual resignation. The resignation needs no acceptance, and indeed cannot be withdrawn, even with the consent of the appointing authority. *State ex rel. Williams v. Fitts*, 49 Ala. 402; *State ex rel. Almon v. Fowler*, 160 Ala. 186, 48 So. 985. The contention of appellant that Title 17, Section 22, of the Code of Alabama 1940, requires the registrars to hold office until their successors are appointed is based upon construing the word "may" in the statute to read "shall" or "must" and is without merit. The precise question has been passed upon by the Supreme Court of Alabama long before this case arose. *Cooper v. State*, 226 Ala. 288, 147 So. 432. In addition, the appointing authority notified Rogers and Livingston that they had been removed as members of the Board of Registrars, and as is provided in Title 17, Section 22, Code of Alabama 1940, supra, the appointing authority has the power to instantly and peremptorily remove any registrar, with or without cause.

Even if this were not sufficient, neither Rogers nor Livingston can be a member of the Board of Registrars for this further compelling reason: They had accepted and held another public office, and this, as a matter of law, automatically vacates the first office, ipso facto. No person shall hold two offices of profit at one time in this State. Intention or "good faith" in

that situation is not material. Section 280, Constitution of Alabama 1901; Title 41, Section 5(7), Code of Alabama 1940; *State ex rel. Camp v. Herzberg*, 224 Ala. 636, 141 So. 553.

These offices, or official positions, are created by State law, controlled by State law, and extinguished by State law. Therefore, neither Rogers nor Livingston held the office of member of the Board of Registrars at the time suit was instituted. Accordingly, it was proper that the Trial Court dismiss the case as to them.

II

The District Courts of the United States have jurisdiction of proceedings instituted under the Civil Rights Act as provided by that law. The wording of the Act conveys no authority for actions against states, and to interpolate such a provision into the law is completely unjustified. The specific point has been passed upon by the courts in a half-dozen cases; the clear and uniform rule is that the Civil Rights Act operates upon individual persons only and not upon the sources of their authority. There is not a single case to the contrary. Numerous cases holding that states are not proper parties defendant under the Civil Rights Act were decided before enactment of the 1957 Amendment. It can be presumed that Congress was aware of the uniform construction of the Act as to permissible parties defendant. The fact that Congress made no change of this feature of the Act is itself indicative of legislative intent.

There are numerous considerations which strengthen this conclusion. First, the appellant's contention to the contrary, the legislative history of the Act reveals no intention to authorize proceedings against a state, as such. The testimony before the committees indicates

an intention that the Act was to be used only against individual persons and shows that the Amendments contemplated no change of that part of the Act.

Nowhere in the Act are specific words which authorize suits against a state. The general rules of statutory construction exclude the government, whether federal or state, and its agencies, from the purview of such statutes in the absence of provisions clearly extending the statutes to them.

The courts should act cautiously before construing this or any other statute to empower the courts to control governmental functions of a state by injunction; the purpose of the law would be better served by actions against the offending individuals or public officials. The public official who denies any other person his constitutional rights is acting personally and not as an agent for the state, particularly so in this instance, where the State law itself expressly forbids any discrimination between applicants for registration. Congress recognized the doctrine alluded to above, and, by not specifically extending the Act to cover states, evidenced approval, or acceptance, thereof.

The Courts from the beginning of the Civil Rights cases have seen that such legislation must act upon persons, not upon the abstract thing denominated a state. This accomplishes all the legitimate purposes of the Acts and in nowise invades state sovereignty.

As the District Court in this case observed: "It is the individuals on the Board, and not the Board itself, that conduct the registration; it is the individuals on the Board who may by their 'acts and practices' deprive other persons of rights and privileges secured by the Constitution of the United States; it is the individual members of the Board who are under a constitutional

obligation relative to registering qualified applicants of Macon County, Alabama, to vote." This same reasoning answers appellant's contention that a state can be, and should be, made a party defendant.

The Civil Rights Act relied upon here authorizes actions against individual persons only.

III

Even if, for the sake of argument, it be conceded that the Civil Rights Act authorizes actions against a state, the Court should refrain from granting an injunction against the State of Alabama under the facts here alleged. It may well be that the plaintiff has an appropriate remedy by injunction against individual state officials who deprive other persons of constitutional rights; however, it does not follow that the courts possess similar authority to proceed directly against a sovereignty, or that such power should be exercised if possessed.

The injunctive power of the Courts is the result of historical development. The traditional equitable principles certainly never were extended to reach a government in its sovereign or governmental capacity. Indeed, the courts have rarely entered the "political thicket" by attempting to adjudicate matters involving a state's governmental functions as distinguished from a state's proprietary interest. It would be a departure from our concept of government for a district court to exercise general supervisory control over a state government. It never has been considered a judicial function of the Courts to perform the ordinary duties of an executive branch or administrative department of the government. It is not clear that the Court could enforce the kind of injunction sought here. Whether a

person, resident of and a citizen of Alabama, is entitled to be registered for the purpose of voting is determined solely by weighing his or her qualifications and disqualifications by standards outlined in the Constitution and statutes of Alabama, and the question of alleged unconstitutional discrimination in registration cannot be determined by classes or groups of individuals, as this action attempts to do, but must be determined as to each individual.

It is difficult to see the consequential effect if the Trial Court were required to enjoin the State of Alabama; but among the unfortunate effects which can be foreseen, it is apparent that the Federal Courts would become the Boards of Registrars for each county in the State, taking over the work involved in each individual registration.

The judiciary will not ordinarily encroach upon the other departments of government. Nor will the courts exercise injunctive power to control or direct the executive departments of government which involve the exercise of judgment or discretion.

The courts have repeatedly held that when state officials are acting in an unconstitutional or otherwise illegal manner they are not regarded as acting for the state. It is the offending officials who are subject to being enjoined. That remedy is clear and adequate. The courts should not and need not embark upon the uncharted waters of proceeding directly against a state.

The Federal Courts must be careful to adjudicate, and not legislate, in their legitimate concern to protect against voter racial discrimination.

ARGUMENT

I

DEFENDANTS ROGERS AND LIVINGSTON HAD NO CONNECTION WITH THE BOARD OF REGISTRARS OF MACON COUNTY, ALABAMA, FOR ANY PURPOSE AT THE TIME OF SUIT

The lower courts determined as a question of mixed fact and local law that Grady Rogers and E. P. Livingston had completely and effectively resigned from the Board of Registrars of Macon County, Alabama, prior to the time suit was filed and that neither had any connection with the Board of Registrars for any purpose at the time suit was filed.

Title 17, Section 22, Code of Alabama 1940, provides the following:

> "The registrars so appointed under this Article may be removed at the will of the appointing board, or a majority of the members thereof, at any time, with or without cause, and without giving their reasons therefor; and if not so removed, the registrars *may* hold office for four years from the time of their appointment and until their successors are appointed." (Emphasis supplied)

The Governor, Auditor and Commissioner of Agriculture and Industries constitute the appointing board under the provisions of Section 21 of said Title 17.

The argument of the United States in the District Court and in the Fifth Circuit Court of Appeals was that the use of the word "may" as used in the above statute is to be construed as "shall", and therefore it is the duty of the registrars to hold office until a successor is appointed.

Stated another way, it is contended by the United States that the resignations of Appellees Livingston and Rogers are not effective until their successors are appointed.

View this case as one may, State law governs the resignations in question and their effective date. *Edwards v. United States*, 103 U. S. 471; *Amy v. City of Watertown*, 130 U. S. 301.

Indeed, the appellant recognizes this rule on page 41 of its brief, then blithely ignores its validity by a specious argument that, although the office of voting registrars is a creature of the Alabama law and Alabama law controls the termination of the powers of that office, yet in some way, the individuals must continue to serve ex officio after official connection has been severed!

A public office established to provide governmental services for a state is created by the State Legislature and can be abolished by the State Legislature. Surely the Legislature can effectively provide for the removal of the officer or the termination of his powers under the state created office. See *Higginbotham v. Baton Rouge*, 306 U. S. 535, 83 L. Ed. 968.

In 1893, by Act of February 21, 1893, page 837, the Legislature of Alabama provided that judges of probate shall superintend the registration of electors in their respective counties. The Governor was then authorized to appoint one competent registrar for each county and a competent person as precinct registrar for each precinct in the respective counties. Each of the persons so appointed "shall hold office for four years or for the unexpired term of their predecessors in office in the event of an appointment to fill a vacancy." Article 2, Chapter 40, Volume 1, Code of Alabama 1896.

By Section 5 of Act No. 480, General Acts of Alabama 1903, page 438, registration was first provided for by a board of three reputable and suitable persons who are also qualified electors resident in the county. They were appointed by the Governor, State Auditor, and Commissioner of Agriculture and Industries, or by a majority of them. It was further provided that the registrars so appointed "shall hold office for four years and until their successors are appointed."

Then again, in the Code of Alabama 1907, it was likewise provided by Section 301 thereof that "The registrars so appointed shall hold office for four years and until their successors are appointed."

By Act No. 78, General and Local Acts of Alabama 1920, page 78, (Special Session) the Legislature changed the prior law from "shall hold office for four years" to "may hold office for four years," and this is the law as it now stands and as it was when this suit was filed. Title 17, Section 22, Code of Alabama 1940, supra.

It is thus shown beyond question that the Legislature did not intend "may hold office for four years" to mean "shall hold office for four years."

The legislative intent is the controlling factor in arriving at the true meaning of any statute. This legislative history shows this intent to be that "may" was not meant to be construed as "shall" as contended by appellant.

The Supreme Court of Alabama expressly rejected a similar contention in regard to this very statute under consideration in *Cooper v. State*, 226 Ala. 288, 147 So. 432.

But even if "may" be construed as "shall", the Appellees Livingston and Rogers under Alabama law had

legally and effectively resigned before this suit was brought.

The following public officers in Alabama *shall hold* their respective offices for the term of four years and until their successors shall be elected and qualified:

1. Governor
2. Lt. Governor
3. Attorney General
4. Auditor
5. Secretary of State
6. Treasurer
7. Superintendent of Education
8. Commissioner of Agriculture and Industries
9. Members of the Public Service Commission
10. Circuit Solicitors
11. Sheriff
12. Coroner
13. County Commissioners
14. County Treasurer
15. Justices of the Peace
16. Constable

The following public officers in Alabama *shall hold* their respective offices for the term of six years, and until their successors shall be elected and qualified:

1. Chief Justice
2. Members of the Supreme Court
3. Judges of the Court of Appeals
4. Circuit Judges
5. Judges of Probate
6. Circuit Court Clerks
7. Judges of Inferior Courts
8. Tax Assessors
9. Tax Collectors

The following are the provisions of Alabama law relating to the terms of office of the above officers. Section 15, Title 41, Code of Alabama 1940:

> "The governor, lieutenant-governor, attorney general, auditor, secretary of state, treasurer, superintendent of education, commissioner of agriculture and industries, the president of the public service commission and two associate public service commissioners, shall hold their respective offices for the term of four years from the time of their installation in office, and until their successors shall be elected and qualified, such installation to take place on the first Monday after the second Tuesday in January next after their election."

Section 17, Title 41, Code of Alabama 1940:

> "Circuit solicitors shall hold office for the term of four years from the first Monday after the second Tuesday in January next after their election, and until their successors are elected and qualified."

Section 18, Title 41, Code of Alabama 1940:

> "The sheriff, one coroner, county commissioners, or members of board of revenue, or boards or courts of like jurisdiction, one county treasurer, when elective, two justices of the peace, and one constable for each election precinct, shall hold their respective offices for the term of four years from the first Monday after the second Tuesday of January next after their election, and until their successors are elected and qualified."

Section 16, Title 41, Code of Alabama 1940:

> "The chief justice of the supreme court and associate justices of said court, the judges of the

court of appeals, circuit judges, judges of probate courts, and clerks of the circuit court; and judges of inferior courts, when not otherwise provided for by law, shall hold their respective offices for the term of six years from the first Monday after the second Tuesday in January next after their election, and until their successors are elected and qualified."

Act No. 113, General Acts 1943, page 115, in pertinent part:

"... the term of office of all county tax assessors shall be for a period of six years and they shall hold office until their successors are elected and qualified ..."

Act No. 114, General Acts 1943, page 115, in pertinent part:

"... the term of office of all county tax collectors shall be for a period of six years, and they shall hold office until their successors are elected and qualified ..."

There is nothing in Alabama law which prohibits the resignations of these public officers even though vacancies are created immediately upon the resignations becoming complete. They are not required to hold their offices until their successors are elected and qualified.

Title 41, Section 160, Code of Alabama 1940, provides that any office in this State is vacated "by his resignation except in such cases as are excepted by law." There are no exceptions as to registrars. This has been the law of Alabama since the first Code of 1852. In full the Statute is as follows:

"How offices are vacated.—Any office in this state is vacated:

By the death of the incumbent.

By his resignation, except in such cases as are excepted by law.

By ceasing to be a resident of the state, or of the division, district, circuit, or county, for which he was elected or appointed.

By the decision of a competent tribunal declaring his election or appointment void, or his office vacant.

By the act of the legislature abridging his term of office, when the same is not fixed by the constitution.

In such other cases as are or may be declared by law."

No one, except the United States, has ever contended that under Alabama law an office could not be vacated by resignation, and that one resigning had to continue to serve until his successor was elected or appointed.

It is obvious that most of the above named officers perform "Federal duties" as well as State duties.

As far back as 1873, in the case of *State ex rel. Williams v. Fitts*, 49 Ala. 402, the Supreme Court of Alabama ruled that:

> "Except in some rare instances, no person is compelled to hold office. He may retire at his mere will, upon the moment . . . when he transmits an unconditional resignation, which he intends shall reach the officer or authority entitled to receive it, he resigns."

The above case involved the resignation of a county solicitor.

The above rule of law in Alabama was reaffirmed in *State ex rel. Almon v. Fowler*, 160 Ala. 186, 48 So. 985, a 1909 case.

The United States seeks to have this Court believe that the resignations of Livingston and Rogers were in bad faith; this, despite the undisputed evidence in affidavit form to the contrary and despite holdings to the contrary by both the District Court and the Fifth Circuit Court of Appeals.

One statement of fact will suffice. The Appellee Rogers offered himself as a candidate in March, 1958 for the Alabama Legislature in the May Primary of 1958 which was long before the Civil Rights Commission ever entered Alabama. He was nominated in the May Primary and elected as a Member of the Legislature the following November. The organizational Session of the Legislature was in January 1959. He resigned as a registrar on December 10, 1958.

That is what the Solicitor General calls bad faith.

Under the Constitution and laws of Alabama, two offices of profit under this State cannot be held by any person at one and the same time. Section 280, Constitution of Alabama 1901; Title 41, Section 5, Subsection 7, Code of Alabama 1940.

Section 280, supra, provides the following:

> "No person holding an office of profit under the United States, except postmasters, whose annual salaries do not exceed two hundred dollars, shall, during his continuance in such office, hold any office of profit under this state; nor, unless otherwise provided in this constitution, shall any person hold two offices of profit at one and the same time under this state, except justices of the

peace, constables, notaries public, and commissioner of deeds."

Subsection 7, supra, provides the following:

"No person holding an office of profit under the United States, shall, during his continuance in such office, hold any office of profit under this state; nor shall any person hold two offices of profit at one and the same time under this state, except notaries public."

And the acceptance of an office of profit by a person already holding another office of profit operates as a vacation of the office first held. *State ex rel. Camp v. Herzberg*, 224 Ala. 636, 141 So. 553.

So viewed in any light, the Appellees Livingston and Rogers effectively and completely resigned on December 10, 1958, and before this suit was brought in the District Court.

In the *Edwards* case, 103 U. S. 471, the Court said:

"But conceding that the law in some of the states is as contended for by the plaintiff in error —and he cites cases to this purpose decided in Alabama, Indiana, California and Nevada and conceding that Justice McLean's decision may have been correct in the particular case before him, the question is: What is the law of Michigan"?

Here the question is: What is the law of Alabama?

This is recognized by Government Counsel when it was stated in their brief filed in the Fifth Circuit Court of Appeals:

"The question therefore is principally one of the proper construction of Alabama law as to the

requirement of registrars to hold office until successors are appointed."

We call to the Court's attention that resignation is not the only reason here by which Rogers and Livingston were separated completely from their former office. In addition to the uncontroverted fact of resignation, the acceptance of other offices automatically vacated the first offices; and the appointing authority had the independent power of removal and exercised it.

We have shown that under Alabama law they do not hold office after their resignation or removal until successors are appointed. This being true, the judgement of the District Court and of the Court of Appeals was absolutely correct and should be affirmed.

There is no case decided by this Court, nor do we believe there ever will be, which holds that notwithstanding state law to the contrary, the resignation of a voting registrar is not effective for federal purposes until his successor has been appointed. That contention is simply one advanced by counsel for appellant under the belief that this Court will accept any kind of argument so long as it may result favorably to prospective Negro voters. We think otherwise.

The United States would have this Court say, in the absence of congressional action, that Livingston and Rogers must serve until their successors are appointed and further that a federal court can supervise their actions in registering or failing to register prospective voters, black or white; but since the only possible jurisdiction arises from "discrimination because of color", presumably the Court could supervise the registration of only the Negro applicants!

None of the cases cited by appellant support any such proposition as contended for by appellant, and its pres-

ent argument was not even thought of or advanced until the case reached this Court.

A moment's reflection brings to mind the chaotic situation which would be created by upholding the appellant's contention. Bear in mind that the remedy here sought under the Civil Rights Act is not punitive or compensatory for past discriminations but injunctive relief to prevent future discriminations. Certainly if the offending officials are not functioning they cannot commit future discriminations. Suppose the appellant's view was imposed upon Rogers and Livingston and they are compelled by a mandatory injunction (the effect of the argument at page 50-56 of appellant's brief): Their second State offices would be threatened because of the Alabama Constitutional prohibition against holding two offices; their past records would not be available for their future use; they would have no office furniture or equipment, and indeed, no building or room in which to perform this forced function. If these physical and functional considerations are not sufficient to demonstrate the complete impracticality of the proposal, then examine the complete governmental confusion engendered. These registrars would no longer have any State authority and would function only by federal direction or compulsion. Would they be able to register white voters as well as Negro voters? (Probably not because any Federal authority is based on racial discrimination.) Would the Alabama constitutional and statutory qualifications pertain, i. e., the age requirements, etc.? Or, would general "equitable" considerations rather than strict statutory voter qualification control? Would the voters so qualified by these registrars performing a "Federal" duty to register Negroes be entitled to vote in state and county elections or only in federal elections? Who would pay

the expenses and per diem for these registrars rendering this enforced service? What happens if one of the registrars is moved by his employer from Alabama to another state? Would he be forced to remain in Alabama to perform this function until some successor is found who is willing to accept such a binding official position? Etc., etc.

At pages 54-56 of appellant's brief, some argument is presented on a purely procedural question (which is raised here for the first time): Was there substantial error in the Court dismissing the complaint without a full trial? We concede that the allegations in the complaint are taken as admitted for the purpose of a motion to dismiss; but the filing of affidavits with the motion to dismiss placed upon the appellant the burden to disclose the merits of his case by counter-affidavit. Moreover, there was no allegation that the resignations were in "bad faith." The closest allegation is found in the Complaint at 12.(e) (R. 5) "From December 1958 to the present, the Registration Board rendered itself inoperative by the purported resignation of its only two members." The Court, with the full participation of all parties, proceeded under Rule of Civil Procedure 12(b) (6) and 56. Both sides presented affidavits. That procedure is customary and proper. *Williams J. Kelly Co. v. R. F. C.* 1 Cir., 172 F. 2d 865; *Cook v. Hirschberg*, 2nd Cir., 258 F. 2d 56; *Geller v. Transamerica*, 53 F. Supp. 625, 629, and many other cases.

As stated by appellant in the petition for a Writ of Certiorari, the principal question in this case is whether the Civil Rights Act of 1957 authorizes the grant of injunctive relief against a state. (Petition for Writ of Certiorari, pages 2 and 5.) It should be so treated by this Court in its future consideration of this case.

II

AN ACTION UNDER THE CIVIL RIGHTS ACT MUST BE AGAINST INDIVIDUAL PERSONS OR OFFICIALS; AND THE STATE OF ALABAMA IS NOT A PROPER PARTY DEFENDANT IN AN ACTION BROUGHT UNDER THE CIVIL RIGHTS ACT OF 1957

Registration is conducted by individual officials. If they are guilty of discrimination, the action can and should be brought against those individuals. This gives ample remedy to petitioner and refutes any idea of urgency or necessity for this procedure and also demonstrates the impropriety or lack of necessity for suing a state in its sovereign capacity, particularly where the state laws directly forbid the discrimination complained of.

The courts from the very beginning of the Civil Rights cases have seen that such legislation must act upon persons; not upon the abstract thing denominated a state. This accomplishes all the legitimate purposes of the statutes and in no wise invades state sovereignty. *Ex Parte, Commonwealth of Virginia (1879)*, 100 U. S. 339, 347; 25 L. Ed. 676, 679.

Furthermore, as is pointed out in the opinions of the Trial Court and Court of Appeals, the Civil Rights Act of 1957 has been sufficiently interpreted by the courts to make it clear that the remedies contemplated by the Civil Rights Act are against "persons" and not against "states".

The complaint shows on its face that this action is brought under the Civil Rights Act of 1957 (P. L. 85-315, 71 Stat. 634, 42 U. S. C., Sec. 1971). A leading case on the subject is *Handy Cafe v. Justices of the Su-*

perior Court of Mass., 248 Fed. 2d 485, Cert. Den. March 10, 1958; 356 U. S. 902, holding that the District Courts of the United States have only such jurisdiction of proceedings instituted under the Civil Rights Act as is there provided. In its opinion, the Court of Appeals, First Circuit, indicated clearly that groups or bodies of officials do not constitute suable legal entities in themselves and ruled that the Civil Rights Act is applicable against individual persons only.

There are a number of other cases dealing with this basic legal proposition of proper parties defendant under the Civil Rights Act. *These cases uniformly hold that the Act is directed against defending persons and not the sources of authority.* No case to the contrary dealing with Civil Rights has been found by us or cited by the appellant.

The following cases clearly support the Trial Judge and Circuit Court of Appeals (cited by the Court of Appeals) in their rulings on this point:

McSwain v. County Board of Education, 104 Supp. 861 (Tenn. 1952) holding that the Civil Rights Act (then cited under Sec. 43, Title 8, USCA; now transferred to Title 42) "operates upon persons, not upon the sources of their power," therefore, the State of Tennessee was not a proper party.

Jerrell L. Graves v. The City of Bolivar, Missouri, 154 F. Supp. 625 (Missouri 1957) holding that the Civil Rights Act extends to "person" acting under color of a statute, ordinance, regulation, custom or usage of a state or territory, who deprives a citizen or other person of a right, privilege, or immunity secured by the Constitution of the United States, and a "person" as used therein

does not encompass a municipal corporation; the motion to dismiss as to the city was sustained.

Hewitt v. City of Jacksonville, 5 Cir., 188 F. 2d 423, Certiorari Denied, 342 U. S. 835, 72 S. Ct. 58, 96 L. Ed. 631, holding that the word "persons" used in the Civil Rights Statute does not include a state or its governmental subdivisions acting in their sovereign, as distinguished from their proprietary, capacity. (Lower Court was held correct in refusing to allow the amendment adding City of Jacksonville as a party defendant.)

Charlton v. City of Hialeah, 188 F. 2d 421 (U. S. Ct. of Appeals, 5th Circuit), holding Congress, by enactment of the Civil Rights Act, did not create liability on the part of a municipality as distinguished from the "person" who committed the acts which deprived a person of his civil rights; that an action under the Civil Rights Act against a Florida city was in effect an action against the State of Florida itself; and "it was not intended by the 14th Amendment and the Civil Rights Statute that all matters formerly within the exclusive cognizance of the states should become matters of national concern. A construction such as sought by the appellant would find a violation of federal rights in every departure from local or state law by local or state officers. Every illegal discrimination by a policeman on the beat would be a state action for the purpose of suit in a federal court."

The above cases, which were referred to in the opinion of the Court of Appeals, can be supplemented by additional decisions showing a similar uniform construction by the Courts of this feature of the Civil Rights Act:

Shvey v. State of Michigan, et al., 106 F. Supp. 32 (Michigan, 952) holds that a municipality is not a "person" subject to liability under the Civil Rights Act. (Motion to dismiss sustained as to State of Michigan and City of Detroit.)

Cobb v. City of Malden, 202 F. 2d 701 (Court of Appeals, First Circuit 1953), holds that the courts are not warranted in reading into the language and purpose of the Civil Rights Act a right of action against a municipality; stating, "At least with regard to the operation of its school system, we think that a municipality is not liable for the conduct of its officials who flout the Constitution."

Agnew v. City of Compton, 239 F. 2d 226, Certiorari Denied, 353 U. S. 959, 77 S. Ct. 868, 1 L. Ed. 2d 910, (Court of Appeals, Ninth Circuit 1957) held that a city acting in its sovereign capacity cannot be held liable under the Civil Rights Act.

Cuiksa v. City of Mansfield (Court of Appeals, Sixth Circuit 1957), 250 F. 2d 700, held that governmental immunity from suit of a municipality performing a governmental function has not been abrogated by the Civil Rights Statute, citing among other authorities, *Aldrich v. City of Youngstown*, 106 Ohio St. 342, 140 NE 164, 27 ALR 1497 and *Tenney v. Brandhave*, 341 U. S. 367, 71 S. Ct. 783.

More recent cases are:

Egan v. City of Aurora (District Court N.D. Ill. E. D. 1959) 174 F. Supp. 794, Civil Rights case, held that no cause of action was stated against

the City, because of the City's common law immunity.

F. L. Shuttlesworth, et als. v. The City of Birmingham, et al., Civil Action No. 9505. In the United States Court for the Northern District of Alabama, Sou. Div., decided January 27, 1960, (not yet reported) in which the City was dismissed as a party defendant from an action for injunctive and declarative relief, the Court held that "a municipality has been held not to be a 'person' as used in the Civil Rights Act, where it is acting in its sovereign, as distinguished from its proprietary, capacity." The Court also stated: "In any event, the granting or denial of injunctive and declaratory relief rests in the sound discretion of the Court," citing *Cobb v. City of Malden*, 202 F. 2d 701.

This was the settled construction before the Civil Rights Amendment of 1957 was considered and passed; and that clear and definite interpretation was known to Congress.

The Courts have consistently followed the same construction of the Act since passage of the 1957 Amendment as before its passage. It is submitted that legislation would be required to change this settled and recognized construction.

Nowhere in the Government's brief do they explain how their complaint satisfies Paragraph (c) of Section 1971 of the Civil Rights Act, which provides whatever authority the Attorney General has to institute a proceeding for preventive relief. It is there required that it appear that reasonable grounds exist to believe that some person is about to engage in an act or practice which would deprive some other person (specifically

the Negroes mentioned in the complaint) of voting rights. It appears from the face of the complaint that the defendant, State of Alabama, has threatened no action which would discriminate against these Negroes. The complaint shows that the laws of the State of Alabama direct the officials acting as registrars to follow certain procedures which are clearly non-discriminatory. A review of the complaint and the statutes of the State of Alabama referred to therein demonstrates that it cannot be charged that the State of Alabama has participated in, or is about to participate in, any discrimination as to any person's voting rights. The allegations of the complaint make no showing that any of the defendants are intimidating, threatening, or coercing any person for the purpose of interfering with the right of such person to vote. Moreover, the statutory and constitutional provisions recited in the complaint, and of which this Court takes judicial knowledge, specifically negate any charge or allegation to the contrary as to the State of Alabama. It is not shown in any way that these twenty Negroes named, or those situated like them, are in any different situation from anyone else, and there is no way to gain an inference from the complaint that they are threatened with discrimination by the State of Alabama.

A careful reading of the Civil Rights Act shows that the word "person" appears many times. Part IV of the Civil Rights Act of 1957 in paragraph (c) (P. L. 85-315, 71 Stat. 634, 42 U. S. C., Supp. V. (1971(c)) contains whatever authority the Attorney General possesses for instituting suit:

> "(c) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or

privilege secured by subsection (a) or (b), the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person."

The word "person" means an individual person and does not inferentially include a state: A word is generally given the same meaning wherever it is found in a particular statute. Quoting the applicable portion of the Statute, "whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive *any other person* of any right or privilege" respecting voting. A state of course cannot vote. Obviously, only an individual person possesses the right or privilege secured by Subsection (a) or (b) of the Section, which is the right of an individual person to vote. Therefore, when the word "person" is used throughout the Statute, it means, of necessity, an individual person, and cannot include a state.

As indicative that sovereigns are not included in the word "person", Paragraph (c) distinguishes the United States by providing "In any proceeding hereunder, the United States shall be liable for costs, the same as a private person."

There are no words in the Statute conveying authority to proceed directly against a state. Appellant seeks to construe the Statute in such a way as to include the State as a party defendant. The general law of statutory construction does not support the appellant's position. Generally, neither the Government, whether

federal or state, nor its agencies are considered to be within the purview of a statute, unless an intention to include them is clearly manifested. This general doctrine applies with special force to statutes by which prerogatives of the government involved would be diminished. *82 Corpus Juris Secundum, Statutes, Section 317, page 554.*

This doctrine was recognized by the Trial Court, which used the analogy found in the decision of the Supreme Court of the United States in *United States v. Mine Workers (1947)*, 330 U. S. 258, 275.

The legislative history of the Civil Rights Act does not bear out the contention of the appellant that Congress intended for the Civil Rights Act to operate directly against a state as distinguished from operation against an offending individual or official. At the time Congress amended the Civil Rights Act in 1957, the clear and uniform ruling of the courts that the Act operated only against individual persons was, of course, known to Congress. Congress did not change this feature or aspect of the Civil Rights Act. This, of itself, is an indication of congressional intent.

The intent of Congress is also revealed in the hearings. See the testimony and statements before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, Eighty-Fifth Congress.

At page 570 of this Civil Rights hearing report, the Honorable Herbert Brownell, Jr., as Attorney General of the United States, testified and traces the history of the Civil Rights Act, and there clearly shows that Section 1971 of the Act applies only to "private persons", "only to those who act 'under color of law', which means public officials, and the activities of private persons."

Again, at page 589, Mr. Brownell testified that it was desired that the laws be amended to permit the Federal Government to seek from the Civil Courts preventive relief in Civil Rights cases, and at the bottom of page 590, he states:

> "Criminal prosecutions, of course, cannot be instituted until after the harm has been actually done, and under the present proposals the Attorney General would be authorized to go to the civil courts for injunctive and other appropriate relief as the cases may require."

Then on page 606, discussing Part 4 of the Bill which was enacted into the law, Mr. Brownell testified, as follows:

> ". . . At the present time, our jurisdiction is limited to commencing criminal proceedings under section 241 and 242, which are the criminal provisions of the civil-rights laws. Under 242, it is necessary that the wrongdoer be a State officer. In other words, that he be acting under color of law. Under section 241, you have to prove a conspiracy. The statute operates only against conspirators, in other words . . ."

> ". . . To repeat, the proposed legislation, which we offer you this morning, would make no change in the Department's jurisdiction in this matter. What it would do is to give the Department civil powers in addition to the existing criminal powers. With these new civil powers, we could reach only the same situations which are now susceptible to action under the sections 242 and 241 . . ."

Could that mean anything other than the clear meaning that the jurisdiction of parties defendant is not enlarged upon? Clearly, the Attorney General of the

United States, at the time of the passage of the Amendment, emphasized himself that the State cannot be made a party. Quoting from the Government's Brief to this Court (page 51) in the case of *U. S. A. v. Raines*, Case No. 64, this term:

> "In the Report of the Judiciary Committee of the House (H. Rep. No. 291, 85th Cong., 1st Sess., pp. 13-15), there is reproduced a letter from the Attorney General to the Speaker of the House . . . In this letter, the Attorney General made this statement:[37]
>
> "The existing civil voting statute (sec. 1971 of Title 42, U. S. C.) declares that all citizens who are otherwise qualified to vote at any election (State or Federal) shall be entitled to exercise their vote without distinction of race or color. *The statute is limited, however, to deprivations of voting rights by State officers or other persons purporting to act under authority of law.* In the interest of proper law enforcement to guarantee to all of our citizens the rights to which they are entitled under the Constitution, I urge consideration by the Congress * * * of three changes.
>
> "First, addition of a section which will prevent anyone from threatening, intimidating, or coercing an individual in the exercise of his right to vote, whether claiming to act under authority of law or not, in any election, general, special, or primary, concerning candidates for Federal office. (Emphasis added)
>
> "As indicated above (p. 47), the interpretation placed upon the proposals by the Attorney General deserves particular consideration, in light of the fact that Administration proposals were here involved.

"[37]H. Rep. No. 291 at p. 15. The letter, dated April 9, 1956, discusses the Administration's 1956 proposals for civil rights legislation. Since the same recommendations were made in 1957 this letter was incorporated into the 1957 reports."

Therefore, the decision of the *Handy case* and other similar cases are properly controlling, and still controlling.

There are other considerations showing that it was never contemplated that proceedings would be brought in the District Courts directly against a state.

Had it been intended that states could be made parties defendant under the Civil Rights Act, Congress would have worded Section 137, Paragraph (d) differently. This is the paragraph conferring jurisdiction on the District Courts; it is well known that the Constitution of the United States in Article III, Section 2, gives the Supreme Court of the United States original jurisdiction (but not necessarily exclusive jurisdiction) in proceedings against states. The wording of this provision would be an attempt to oust the Supreme Court of its concurrent original jurisdiction if states could be made parties, as the Act provides for original jurisdiction in the District Courts only. Obviously, it was never intended that actions under the Civil Rights Act be brought directly against states.

Moreover, the Act speaks of "practices which would deprive any other person of any right or privilege . . .", and the "party aggrieved." The obvious purpose of Paragraph (c) added by the 1957 Amendment was to authorize the Attorney General to institute a civil action for preventive relief for or in behalf of those persons threatened with a deprivation of their constitutional voting rights. To permit such an action directly

against a state would be an attempted evasion of Article XI of the Constitution which prohibits suits by citizens against the states.

It is apparent that the United States has no direct interest in spite of the general wording of the provision of Paragraph (c) of 1971, under which this action is brought. In that connection we refer the Court to the testimony of Mr. Brownell in the Civil Rights hearings before Subcommittee No. 5 in February, 1957, at page 599, where this testimony appears:

> "The Chairman. But it says for the benefit of the real party in interest.
>
> Mr. Brownell. Or for the benefit of the real party in interest.
>
> The Chairman. Suppose the individual brought his own action. Could you intervene in that case under these provisions?
>
> Mr. Brownell. Yes . . ."

And on page 602:

> "Mr. Miller. Would there be any objection of the Department of the inclusion in the bill just a simple provision that where the Attorney General instituted the action in the name or for the benefit of the real party in interest, that it be with his consent?
>
> Mr. Brownell. I would think it might be misleading to do that, . . ."

To clinch the assertion that the real party in interest is not the United States, but certain citizens of the State of Alabama, please examine the wording of Paragraph (d) of Section 1971, which purports to give this Court jurisdiction. There it clearly says that "the party

aggrieved" need not exhaust his administrative or other remedies before suit is brought. "Who is the party aggrieved?" It must of necessity be these complaining witnesses. That being so, this is a suit by the United States for and on behalf of certain individual citizens of the State of Alabama. Then there is no justiciable controversy or actual controversy between the parties. The United States has no proprietary interest or any real interest. The real parties in interest are these citizens. For that reason, this Court should not take jurisdiction of the matter as courts do not entertain suits that are moot as to the parties, or where the parties before the court have no direct interest. Judicial power of courts is always limited to actual controversies by adverse litigants.

Of more importance, it is clear that under the case of *Hans v. State of Louisiana,* 134 U. S. 842, 33 L. Ed. 177, a citizen of a state cannot sue his own state in a district court. Sometimes this is said to be controlled by the 11th Amendment, but at any rate it is settled law that district courts will not take jurisdiction of suits against a state by a citizen of that state. Therefore, it surely follows that, if the real parties in interest, that is, "the aggrieved parties", are citizens of the State of Alabama, Congress did not intend that a state should be sued by a citizen through the United States, only a nominal party, as an evasion device to get around the guarantee of the 11th Amendment granting states immunity from such suits. This further substantiates the view that Congress never intended that a state should be made a party defendant under Civil Rights proceedings.

The public official who denies any other person his constitutional rights is acting personally and not as an agent for the State; particularly so in this instance

where the Alabama law itself expressly forbids any discrimination between applicants for registration. The general law has been settled for years.

When state officials are acting in an unconstitutional or otherwise illegal manner, they are not regarded as acting for the state, either in its sovereign or governmental capacity, and they may be enjoined if the ordinary remedies of law are inadequate. 43 C. J. S., Injunctions, pages 625 and 626.

Injunctive proceedings have never been regarded proper against states as such. 28 Am. Jur. 355; 43 C. J. S. 625, Note 80. It may well be that this doctrine was the result of the State's sovereign position, but in all events the law is clear. Such discrimination as complained of is ultra vires and beyond the scope of the official's authority. Such action is personal, not state action. Quoting from the Opinion of the Supreme Court of the United States in *Ex Parte Young*, 209 U. S. 123, page 159:

> " 'The answer to all this is the same as made in every case where an official claims to be acting under the authority of the State. The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding

under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.'"

Not only is this precedent controlling as such, but it was well known to Congress when the Civil Rights Act was first passed, and when it was amended in 1957. Had they intended to include states as parties to actions for preventive relief, they would have said so.

III

EVEN IF THE CIVIL RIGHTS ACT AUTHORIZES AN ACTION AGAINST A STATE, THE COURT SHOULD REFRAIN FROM GRANTING AN INJUNCTION AGAINST THE STATE OF ALABAMA UNDER THE FACTS HERE ALLEGED

Since the Trial Court dismissed the action as to the State of Alabama on other grounds, it was unnecessary for either the Trial Court or the Court of Appeals to go into the further proposition raised below: That the Court should refrain from granting the requested injunction against the State of Alabama, even if the State could be made a party defendant in this proceeding. *It is a serious and extraordinary matter to enjoin a state.* Comity and other principles are involved, in addition to the equitable consideration of the particular allegations of the instant complaint.

First, an injunction against a state is not necessary to restrain threatened unconstitutional wrongdoing on the part of state functionaries, for the injunctive process can be clearly and definitely exercised against the wrongdoer. *United States v. Raines*, decided by this Court this Term on February 29, 1960.

Second, the Alabama laws now forbid discrimination between voter applicants; and, if a registrar engages in acts of discrimination, he would be violating the State's presently existing directives. To put the State under a Federal Court injunction would not aid the State in control of such a wrongdoer who operates beyond his authority and in violation of the State's already existing positive mandate to him. Why embarrass a state in such a manner?

Even if the complaint should state a cause of action upon which relief *could* be granted, *should* it be granted under the circumstances alleged? Should not the Court, exercising its discretionary power, refuse to entertain the action and refuse to grant the relief sought?

The aspect of equity procedure argued here was adverted to in the case of *United States v. Raines*, decided by this Court February 29, 1960. As referred to in Judge Brennan's Opinion (Note 7 on page 9), this is an alternative ground on which the judgment below could be supported; however, in the *Raines case*, Trial Judge Davis specifically declined to dismiss on that ground, and this Court merely observed that there was not discerned any basis in that posture of the case for the contention that the Trial Court abused his discretion in that determination. Also, that injunction proceeding was directed against the allegedly offending individual officers, the "persons" functioning, and did not involve the delicate question of coercing a governmental unit or separate sovereignty.

It is submitted that to grant such an injunction against a state would be to open a Pandora's Box of unforeseeable consequences. To use the words of Justice Douglas from the *U. S. v. Classic* case, 313 U. S. 299, 331, 85 L. ed. 1368, 1386: "We enter perilous territory."

The State of Alabama has already directed its registrars to handle registration for voting in a manner uniform in all cases, with no discrimination between applicants. If the prayer of complainant be granted against Defendant Alabama, what more could the State, as such, do than again direct its registrars by the same statutory provisions?

If complainants seek to have the Federal Courts supervise voter registration, the District Court would be converted into an administrative body, registering applicants in all 67 counties, or reduced to an appeal board supervising the methods, actions, decisions and determinations as to each individual applicant. The prayer seeks to enjoin the State of Alabama, through its officers and agents, from failing or refusing to register twenty Negroes listed by name and others similarly situated. This is, in effect, a prayer for mandamus, or for a mandatory injunction. First, it must be remembered that whether a person, resident of and a citizen of Alabama, is entitled to be registered for the purpose of voting must be determined solely by weighing his or her qualifications and disqualifications by standards outlined in the Constitution and statutes of Alabama; and the question of alleged unconstitutional discrimination in registration cannot be determined by classes or groups of individuals as this case attempts to do, but must be determined as to each individual. Each application must be considered on its individual merits. Second, the injunction prayed for is itself discriminatory, as it seeks (by Paragraph 17(a) (4)) to force or require registration of *Negro* applicants, but is indifferent to the registration of white applicants! Such a concern for one group would appear unconstitutional itself.

Since this "mandatory injunction" is in effect a man-

damus to compel registration, should the Court entertain the mandamus proceeding? Federal District Courts have no general original jurisdiction in mandamus proceedings.

Encyclopedia of Federal Procedure, Third Edition, Volume 15, Section 84.34, citing among others:

Covington & Cincinnati Bridge Co. v. Hager, 203 U. S. 109

Innes v. Hiatt, 57 F. Supp. 17.

In the latter case the Court said:

> "Moreover, treating the proceedings under the designation of 'injunction', it is in effect an attempt to obtain a mandamus against the Warden of the Penitentiary to change his records, and this Court has heretofore pointed out that where the action is not in aid of this Court's jurisdiction but is an original proceeding in mandamus, the District Court has no jurisdiction. *Hogan v. Hill*, D. C., 9 F. Supp. 975, affirmed 3 Cir. 78 F. 2d. 1017."

That Court is not by itself. For many other cases of like nature, see Courts, Key Number 265, Federal Digest, and especially *Updegraff v. Talbott*, 221 F. 2d 342. That case, written by the late Judge Parker, cogently points out that district courts are without power to grant mandatory injunctions which in effect are writs of mandamus. (op. cit. p. 345).

Ordinarily, injunctions are granted only when the party threatened with injury has no adequate remedy at law: Here we see that the Alabama law provides for appeal, without giving security for costs, within thirty days after denial. Title 17, Section 35, Code of Alabama 1940. It is recognized that the provisions of the

Civil Rights Act, as amended, provide that the district Courts have jurisdiction without regard to whether the party aggrieved shall have exhausted his administrative or other remedies that may be provided by law. However, the point being made here is that "the remedy by injunction, which is a discretionary remedy even when the court has jurisdiction to grant it, ought not to be had to control the state officer in the conduct of his office, even though his conduct may appear wrong, until the remedy to correct him provided by the state has been exhausted. This rule is of special importance between federal courts and state functionaries." (Quotation from *Peay v. Cox*, C. C. A. 5, Judge Sibley, 190 F. 2d 123) That reasoning is all the more apparent when the injunction is sought directly against the state itself! How can it be said that the State is depriving an applicant to register of his rights if the applicant does not follow the corrective process provided by the State law?

Any deprivation or abridgment of an applicant's rights cannot be state action when or if the registrars institute practices of their own and arbitrarily refuse to apply the State law, as is alleged here. How can the State be said to deprive or abridge a person's rights even if as alleged here a registrar takes improper action of arbitrary discrimination in violation of the State laws, and the person aggrieved does not avail himself of the corrective remedies the State has provided?

Any discrimination between applicants for registration is in opposition to the plain prohibitions of the State law; such a practice by a registrar cannot be deemed the constitutional equivalent of denial or abridgment by the State; all the more so, when the State has not been given an opportunity to correct the alleged arbitrary and discriminatory conduct, although

it afforded a remedy for any person who is really seeking to register a vote. Such discrimination alleged is wholly without any authority from the State. This is not merely a matter of exhaustion of remedies. The question is: Has the State deprived or abridged constitutional rights, and should an injunction be directed against the State?

The Court's inherent discretion cannot be eliminated by the mere grant of jurisdiction to a district court. The recognized equitable principles still control.

Of course, the Court can exercise this discretion upon a reading of the complaint as well as after hearing evidence to support the complaint.

Congress cannot expect the courts to break with historic principles of equity in the enforcement of equitable rights. *Holmberg v. Ambrecht*, 327 U. S. 582.

> "Discretionary refusal to exercise equitable power under the Civil Rights Act (of 1870, 1871) to interfere with State criminal prosecution is one of the devices sanctioned for preserving the proper balance between the State and Federal Government in law enforcement. 8 U. S. C. A., Sec. 42."
>
> *Stefanelli v. Minard*, 342 U. S. 117, 72 S. Ct. 118 (H. N. 7)

Because the applicants have the right to appeal, it is safe to say "no irreparable injury, clear and imminent" is threatened. And, if it be asserted that registration is not being conducted in Macon County during the time the Board is vacant, can it be said that Negro applicants are any worse off than white applicants? Besides, it appears that a new Board may be appointed at any time. Or, as the District Judge and the Court of

Appeals observed, the remedy lies in appropriate action to compel the filling of the vacancies rather than perverting the judicial processes (R. 107).

Where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative.

To issue an injunction in this instance amounts to a mandate that the registrars register Negroes as such. This basic premise must be remembered: This suit or action is founded upon the XV Amendment to the Constitution of the United States, which is prohibitory in character and *grants or provides no voting rights.* It simply provides that such voting rights as otherwise exist shall not be abridged by a state on account of race or color.

"Article XV gives no affirmative right to a colored man to vote."

Ex Parte Yarbrough, 110 U. S. 651, 28 L. Ed. 274, 278.

Even Article I of the Constitution relating to choosing U. S. Representatives does not authorize *Congress to legislate on voter qualifications,* and Congress has passed no law under the authority of Article I, Section 4 and Section 8, regulating voter registration. Therefore, the Federal Judiciary cannot create voting rights or voter registration rules and regulations by an extension of the Civil Rights Statute, admittedly founded upon Amendment XV. To sustain the Government's contention would in effect register all Negro applicants because they are Negroes, qualified under the Alabama statutes or not.

As the First Circuit Court of Appeals decreed in *Cobb v. City of Malden (1953),* 202 F. 2d 701, 703,

704, even if a city (exercising a state function) were held liable for the wrongs of its officials, a federal court should deny injunctive relief in the proper exercise of its discretion. In that case, the Trial Judge dismissed the complaint against the sovereign respondent, apparently without a further hearing or proof (as was done in the instant case). The Court set out many instances where federal courts declined to exercise jurisdiction to enforce rights arising under state laws, because of considerations of policy, etc. Certainly an injunction against another sovereignty would work a public embarrassment!

The District Court in its opinion in *Egan v. City of Aurora* (U. S. District Court, N. D. Illinois, E. D. 1959), collects numerous authorities in this field of "delicate federal-state relationship." Quoting therefrom:

> "It is likewise apparent that federal courts cannot be so overzealous in their desire to protect individual rights from State abuse that they unjustifiably deprive the State of their inherent sovereignty also protected by the United States Constitution. For these reasons, the federal courts, in applying the Civil Rights Acts, have been consistently solicitous of 'delicate state-federal relationships'. *Francis v. Lyman* 1 Cir., 216 F. 2d 583, 588 . . . *Screws v. United States*, 325 U. S. 91, 108, 109; 65 S. Ct. 1031, 1039 . . ." (Emphasis supplied)

Other cases are cited.

In this proposition, it is not simply a question of the power of the federal courts to act in these areas, but rather the delicate question of the proper use of such power.

CONCLUSION

The carefully prepared opinions of the Trial Court and the Circuit Court of Appeals are sound.

It appears that the appellant seeks to have this Court legislate, rather than review the issues of a litigated case.

The judgment of the Court of Appeals Fifth Circuit, upholding the decision of the District Court, should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, MacDonald Gallion, Attorney General of Alabama certify that on the ..... day of March, 1960, I mailed copies of the foregoing brief to the Attorney General and the Solicitor General of the United States, respectively, at the Department of Justice Building, Washington, D. C.

.....

MacDONALD GALLION
Attorney General of Alabama

APPENDIX

Amendment No. XCI, Constitution of Alabama 1901
Voters' Qualification Amendment.

"Section 181. The following persons, and no others, who, if they are citizens of the United States over the age of twenty-one years and have the qualifications as to residence prescribed in section 178 of this article, shall be qualified to register as electors provided they shall not be disqualified under section 182 of this constitution: those who can read and write any article of the constitution of the United States in the English language which may be submitted to them by the board of registrars, provided, however, that no persons shall be entitled to register as electors except those who are of good character and who embrace the duties and obligations of citizenship under the constitution of the United States and under the constitution of the state of Alabama, and provided, further, that in order to aid the members of the boards of registrars, who are hereby constituted and declared to be judicial officers, to judicially determine if applicants to register have the qualifications hereinabove set out, each applicant shall be furnished by the board of registrars a written questionnaire, which shall be uniform in all cases with no discrimination as between applicants, the form and contents of which questionnaire shall be prescribed by the supreme court of Alabama and be filed by such court with the secretary of state of the state of Alabama, which questionnaire shall be so worded that the answers thereto will place before the boards of registrars information necessary or proper to aid them to pass upon the qualification of each applicant. Such questionnaire shall be answered in writing by the applicant, in the presence of the board without assistance, and there shall be incorporated in such answer an oath

to support and defend the constitution of the United States and the constitution of the state of Alabama and a statement in such oath by the applicant disavowing belief in or affiliation at any time with any group or party which advocated the overthrow of the government of the United States or the state of Alabama by unlawful means, which answers and oath shall be duly signed and sworn to by the applicant before a member of the county board of registrars. Such questionnaire and the written answers of the applicant thereto shall be filed with the records of the respective boards of registrars. The board may receive information respecting the applicant and the truthfulness of any information furnished by him. Those persons who have registered as electors under the Alabama constitution of 1901 shall not be required to register again. Provided, further, that if solely because of physical handicaps the applicant is unable to read or write, then he shall be exempt from the above stated requirements which he is unable to meet because of such physical handicap, and in such cases a member of the board of registrars shall read to the applicant the questionnaire and oaths herein provided for and the applicant's answers thereto shall be written down by such board member, and the applicant shall be registered as a voter if he meets all other requirements herein set out."

Section 178, Constitution of Alabama 1901

"To entitle a person to vote at any election by the people, he shall have resided in the state at least two years, in the county one year, and in the precinct or ward three months, immediately preceding the election at which he offers to vote, and he shall have been duly registered as an elector, and shall have paid on or before the first day of February next preceding the date of the election at which he offers to vote, all poll taxes

due from him for the two calendar years next preceding. Provided, that any elector who, within three months next preceding the date of the election at which he offers to vote has removed from one precinct or ward to another precinct or ward in the same county, incorporated town, or city, shall have the right to vote in the precinct or ward from which he has so removed, if he would have been entitled to vote in such precinct or ward but for such removal."

Section 182, Constitution of Alabama 1901

"The following persons shall be disqualified both from registering, and from voting, namely:

"All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote of another, or of making or offering to make a false return in any election by the people or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector."

REGISTRATION

Title 17, Section 26, Code of Alabama 1940, as amended.

"Board of registrars to hold fixed meeting and give notice thereof.—The board of registrars in each county shall visit each precinct at least once and oftener if necessary between October first and December thirty-first, 1939, and each two years thereafter, to make a complete registration of all persons entitled to register, and shall remain there at least one half a day. They shall give at least twenty days' notice of the time when, and the place in the precinct where they will attend to register applicants for registration, by bills posted at three or more public places in each election precinct, and by advertisement once a week for three successive weeks in a newspaper, if there be one published in the county. Upon failure to give such notice or to attend any appointment made by them in any precinct, they shall, after like notice, fill new appointments therein. The time consumed by the board in completing such registration shall not exceed thirty working days in any county, except that in counties having more than three hundred thousand population as shown by the last preceding census, the time shall not exceed seventy-five working days. The board of registrars in each county shall meet at the courthouse on the third Monday in January, 1940, and each two years thereafter and shall remain in session ten working days for the registration of voters."

SPECIAL REGISTRATION

Title 17, Section 27, Code of Alabama 1940, as amended:

"Special registration.—In addition to the regular registration provided in this article, the courts of county commissioners, boards of revenue, county commissioners, or other courts of like jurisdiction of the several counties may make an order requiring the books of registration to be opened for ten working days during the month of January, 1941, and each two years thereafter, and it shall be mandatory for the board of registrars to meet on the first Monday in July, 1940, and each two years thereafter, and remain in session at each of said meetings five days for the purpose of registering voters, and the board shall meet on the first Monday in July, 1941, and each two years thereafter and shall remain in session at each of said meetings five days for the purpose of registering persons entitled to register, except that in counties having a population of more than one hundred and ten thousand and not more than one hundred and fifty thousand according to the last or any subsequent federal census, this section shall not apply, and except that in counties having more than one hundred and fifty thousand population, as shown by the last or any subsequent federal census, it shall be mandatory for the board of registrars in said counties having more than one hundred and fifty thousand population, as shown by the last or any subsequent federal census, in addition to the meetings provided for in section 26 of this title, to meet as follows and for the following purposes: The board shall meet on the second Monday in April, the fourth Monday in June, the first Monday in August, the first Monday in October and the first Monday in December, 1940, and each two years thereafter, and shall remain in ses-

sion at each of said meetings for ten days for the purpose of registering persons entitled to register; the board shall meet on the first Monday in February, the first Monday in April, the first Monday in June and the first Monday in August, 1941, and each two years thereafter, and shall remain in session at each of said meetings for ten days for the purpose of registering persons entitled to register. Any voters who may become qualified after a qualified voting list has been made and published as now provided for by law during even numbered years may be added to the list of qualified voters by a supplementary list or lists without making a complete new list of qualified voters."

ADDITIONAL REGISTRATION

Act No. 346, General Acts of Alabama, 1945, page 563 in pertinent part provides as follows:

"That the Board of Registrars of every county of the State of Alabama shall be in session at the court house, or one of the court houses, of their county on the first and third Mondays in each month for the purpose of registering all persons in the armed forces of the United States, Merchant Marine, Red Cross, and other affiliated organizations, stationed or serving outside the county of their residence, and all other persons otherwise qualified under the laws of the State of Alabama to register."